UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

BOZZUTO'S, INC.

And

UNITED FOOD AND COMMERICAL WORKERS UNION, LOCAL 919

Case Nos.
01–CA–115298
01–CA–120801

Jo Anne P. Howlett Esq., Counsel for the General Counsel.
Miguel A. Escalera Jr. Esq., and *Diana Garfield Esq*., Counsel for the Respondent.
J. William Gagne Jr. Esq., Counsel for the Charging Party.
Michael Petela, Jr., Esq., Counsel for Todd McCarty.

Decision

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on January 29 and 30 and March 18 to 20, 2015. The charges and amended charges in these cases were filed on October 21, December 11, and December 20, 2013 and on January 16, February 21, and April 1, 2015. The complaint, which was issued on October 16, 2014, alleged as follows:

1. That on or about September 27, 2013, the Respondent interrogated employees about their union activities.

2. That on or about October 1, 2013, the Respondent orally prohibited employees from discussing the terms and conditions of their employment with other employees.

3. That on or about October 1, 2013, the Respondent announced and implemented wage increases.

4. That on or about October 1 and October 8, 2013, the Respondent issued a verbal warning and thereafter discharged Patrick Greichen because he assisted the Union and engaged in other protected concerted activity.

5. That on or about January 8, 2014, the Respondent, created the impression that employee union activities were being placed under surveillance.

6. That on or about January 15, 2014, the Respondent for discriminatory reasons, suspended Todd McCarty.

7. That on or about February 18, 2014, the Respondent for discriminatory reasons, discharged Todd McCarty.

8. That since October 1, 2013, the Respondent has issued disciplinary actions that condition employment on employees relinquishing Section 7 rights to discuss them with other employees.

The Respondent essentially denied these allegations of the complaint. In addition, the Respondent asserts that it made an unconditional offer to McCarty which was rejected by him. It therefore asserts that backpay should be terminated as of the time that McCarty rejected the offer and that reinstatement would not be warranted as a remedy.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(1), (6) and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

(a) Company Operations and the Start of the Organizing Drive

The Respondent operates a wholesale warehouse for the distribution of food products. These warehouses are located in Cheshire and North Haven, Connecticut. Together they employ about 450 production employees in various categories such as loaders, selectors and forklift operators.

The Company's owner is Mike Bozzuto. Rick Clark is the Senior Vice President of Warehouse, Transportation and Risk Management and Carl Koch is the Vice President of Human Relations. Reporting to Clark is Doug Puza and a number of persons who are not relevant to this case. In turn, John Chetcuti and Jamie Wright are managers who report to Puza. Jason Winans is a supervisor who reports to Chetcuti. There are also a number of front line warehouse supervisors who report to Winans.

In addition to the above named individuals, there is a person named Doug Vaughan who reports to Rick Clark and whose role is essentially to be a liaison with production employees regarding various issues such as work related complaints that may arise from time to time.

The two alleged discriminatees, Patrick Greichen and Todd McCarty, were both employed as selectors at the Cheshire faculty. Their job essentially involved receiving "orders"

for products; driving a motorized vehicle to where items are stored and loading those items onto pallets which eventually make their way to the loading docks from which trucks deliver them to customers. This type of job requires a substantial amount of physical strength. Employees are rated on their performance through a computerized system, which among other things, measures how fast they do their jobs.

Sometime in September 2013, Todd McCarty contacted a representative of the Union and on September 22, he and Greichen, along with two other employees, met with a union representative. At this meeting they were given authorization cards and told to solicit other employees, which they commenced to do on September 23. At the outset, McCarty and the others tried to keep their solicitation activity under the radar. However, by about September 26, word began to get out and one employee posted a note on the internet talking about the union organizing effort.

The evidence shows that the Company became aware of the union activity during the last week of September. This is essentially conceded by company management who described situations where union literature was found in work areas. In this regard, McCarty testified that about the week after the campaign started, he was approached by Rick Clark who asked what was going on with "this union stuff" and he replied that he was not going to talk to him about it. Also, on October 1, the Company posted a notice explicitly acknowledging its awareness of the union organizing campaign while at the same time granting pay increases to most of its production employees.

By the last week of September 2013, the Union had obtained 84 signed authorization cards. Both McCarty and Greichen were the most active union supporters at this time.

(b) The Wage Increases

On October 1, 2013, the Company posted a memorandum announcing that almost all of its production employees except for day shift selectors would be receiving an increase in pay retroactive to September 29. On the same day, the Company also announced that a number of its employees had told management that the Union was attempting to organize the shop. This notice went on to state that the Company was aware that the Union had obtained a list of the warehouse employees. It encouraged employees to refrain from signing union authorization cards and stated that "we do not need a union at Bozzuto's."

The evidence shows that the last time a general wage increase was given was in 2010. Further, the evidence presented by the Company shows that prior to October 1, there only was some discussion about the possibility or advisability of granting wage increases to certain categories of employees.[1] However, the Employer's proffered evidence did not show that the decision to give these increases was reached at any time before the Company became aware of union activity.

The notices posted simultaneously on October 1, 2014, leave no doubt that the pay increases were motivated by the fact that the Company became aware that the Union was engaged in organizing activity. In the absence of a showing that these increases were given on

[1] R. Exh. 2 consists of notes of a supervisor discussion group meeting held in August 2013. It deals with multiple issues including the possibility of pay increases. But it states only that the Company at that time was "currently discussing premium changes in the Freezer, Forklift Loader and Shift." It clearly does not show that any decision was made at that time to increase wages or wage premiums to employees.

a regular and period basis, or that the decision had actually been made before the Company became aware of union organizing activity, I conclude that the Respondent violated Section 8(a)(1) of the Act. *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1344 (2000); *B & D Plastics*, 302 NLRB 245 (1991); *Speco Corp*., 298 NLRB 439, 443 (1990).

(c) Patrick Greichen

At the same time that signatures were being solicited for the Union, Greichen was going around and telling other employees that in his opinion, the Company's production standards were too stringent. In this regard, the Company made some changes to its production standards in July 2014, and Greichen asserted to other employees that the standards required more work. It should be noted that employees are evaluated based on a set of standards established by the Company as to how long it should take to do the various tasks to which they are assigned. If an employee exceeds the standard, he can earn more money; but if he fails to meet the standard, he is subject to discipline and discharge.[2]

On October 1, 2013, Greichen was asked to attend a meeting with Rick Clark, Carl Koch, Doug Vaughan and Bill Glass. At this meeting, Clark asserted that employees were complaining about Greichen's "erratic and scary behavior." When asked to characterize that behavior, Clark's testimony was that Greichen was complaining to other workers about long hours and working conditions.

Greichen received a verbal warning which stated that "his repeated negative attitude and disrespectful behavior . . . have become disruptive to the workforce and work environment." In the attached memorandum, it states inter alia:

> Rick told Patrick he had met with him at least four times in the past year to address the concerns and Patrick had agreed he would follow a communication process in a timely fashion and to the appropriate personnel, not making negative comments in the work force without trying to address the issue with management. Patrick agreed.
>
> * * *
>
> Rick told Patrick he needed to stop disrupting the work environment by making negative comments in the aisles, such as: being forced to work 20 hours per day or comments about needing three legs to do the work here, in the hallway in front of his peers.
>
> Rick told Patrick he fully knows how he needs to properly address his concerns in the work place and he hoped Patrick would follow them going forward….

On October 8, 2013, Greichen told his supervisor that the selection time standard for an order he had to perform was incorrect. He thereafter presented his complaint to Jason Winans

[2] Since each item has a machine readable tag, the Company, through the use of scanners coupled with a computer program, can measure how long it takes to do each and every task from the time an item enters the warehouse until the time it leaves. It seems that these standards are revised from time to time and purport to be an accurate means by which average employee productivity can be used to set a standard against which each employee, each week, is measured.

via the company's open door policy. With respect to the conversation between Greichen and Winans, the latter recounted the conversation as follows:

> On Tuesday, 10/8/13, at 2:00 p.m., Patrick Greichen came to my office very unhappy about how much standard time the system had given him on two specific assignments he had done. In an attempt to calm Mr. Greichen down I went into his PERQ screen to find out which assignments he was referring to so I could show them to him in detail in the PICQ screen. We looked at the assignments and I didn't see anything out of the ordinary. Patrick was concerned about the amount of cases he had to select and the amount of time he was give.
>
> After we looked at the orders, Patrick began telling me how he believes BOZZUTO'S cuts the standard time on assignments on days when the volume is high in order to get more cases out of people and to pay them less, in the process making them miserable. Patrick then told me that he tells anybody and everybody he can that he believes we are purposely changing the standards on a daily basis in order to screw the associates. I told Patrick that I didn't believe any of this to be true and that these were very serious accusations he was making. I went on to say that to the best of my knowledge the company has communicated all changes to standards in my time here.
>
> I asked Patrick why he continued to work here if he thought we were purposely trying to make him miserable. He said that he would get back at the company, not physically but by using the law outside of here. He stated he had too much to lose to do anything physical.
>
> I thought this conversation and the accusations made were serious enough that I should bring it to the attention of upper management… After I told Rick Clark and Dug Vaughn about what had happened, Rick set up a meeting to include the three of us along with the industrial engineering team so that they could explain the standards to Patrick….

After this meeting Winans reported his conversation and arranged for a meeting to be held with Greichen, himself, Rick Clark, Doug Vaughn and someone from the industrial engineering department.

At around 3:45 p.m., Winans told Greichen that he had to go to a meeting to be held at 4 p.m. with Clark, Vaughn and the industrial engineers so that they could explain to him how the standards worked. Greichen said that he couldn't attend the meeting and that he felt that he was being harassed. After consulting with higher ups, Winans told Greichen that the meeting was mandatory and that if Greichen did not attend, he would be suspended pending termination for insubordination. Greichen still refused to attend. And the result was that he was suspended on October 8 and ultimately discharged as a result of this transaction.

The Company explained that the reason it insisted that Greichen attend this meeting was because they wanted him to get the correct information about standards instead of having him talking to other employees and misleading them into thinking that the Company was somehow manipulating the standards in order to possibly reduce incentive pay or require more work.

I note that despite this assertion as to how important it was required for Greichen to attend this meeting; in order to prevent him from giving inaccurate information to other employees about standards, the Company did nothing thereafter to notify or to educate the employees about any mistaken information that Greichen had allegedly previously given to them.[3]

The Respondent's position is that it discharged Greichen not because he was complaining about production standards per se, but because he refused to attend a meeting where a representative of the engineering department would be able to tell him why his complaints were unfounded. I frankly don't see how one can separate these transactions.

The evidence establishes that the October 1 warning was issued because the Company became aware that Greichen was complaining to other employees about how the production standards were established and how they were being applied to both himself and to others. Since these standards determine not only whether employees receive premium pay, but also whether they can be disciplined or terminated, his discussions with his fellow employees constitute protected concerted activity within the meaning of Section 7 of the Act.

Moreover, as this October 1 warning was issued at virtually the same time that the Company notified employees that they should avoid union activity, it seems that given its awareness of Greichen's concerted complaints about productivity standards, the Company's management more than likely believed that he was among the employees who most likely would support a union.

Based on the above, it is my conclusion that the October 1 warning to Greichen violated Section 8(a)(1) and (3) of the Act.

I also conclude that Greichen's discharge on October 8 was violative of the Act. Even taking Respondent's premise that Greichen's refusal to attend a meeting constituted insubordination, I still think that the discharge was unlawful. Greichen was told to go to a meeting to discuss his complaints about productivity standards because the Company was concerned that he was talking about them and misinforming his fellow employees. Thus, the demand that he attend this meeting was inexplicably bound up to the Company's earlier unlawful warning on October 1, which was issued because of Greichen's protected concerted activity. One follows from the other and the October 8 meeting would not have taken place but for the earlier interference with Greichen's right to talk to his coworkers about their collective terms and conditions of employment.

There being no evidence that Greichen, while engaged in concerted activity, conducted himself in a threatening manner, I conclude that his discharge violated Section 8(1) and (3) of the Act. *Approved Electric Corp*. 356 NLRB 238 (2010).

[3] The Company called as its witness James Wright, who is one of the engineers. He was told of the meeting but was not given any details as to why the meeting was to be held. He testified that the person who asked him to come to the meeting was very vague. As to Greichen's failure to show up for the meeting, Wright did not think that this was a big deal. He also testified that he was not asked to talk to any other employees about the inaccurate information that supposedly was given by Greichen.

(d) Todd McCarty

Todd McCarty was, after Greichen left, the sole active union supporter. And there is no dispute that the Respondent was aware of this. Indeed, McCarty, although originally advised to keep a low profile, was later told that being an open union supporter might, in fact, give him some protection from potential company harassment. In this regard, the evidence shows that on several occasions during and after October 2013, he spoke with supervisory personal and disclosed his role as a union activist.

McCarty was a long-term employee who had a good production record and who often earned premium pay based on his performance over and above standards.

In early January 2014, McCarty saw that his reported production numbers seemed to be too low in that the computerized reporting system failed to credit him with "down time." In this regard, down time is unit of time for which a supervisor, for example, has approved an employee break. And this down time, if counted, serves to raise an employee's raw productivity score. That is, if the down time is not counted, then that employee would receive a lower productivity score and be subject to discipline if his score for the week was less than 95 percent of the standard amount of time that is allowed for the tasks performed by that employee. (It is not necessary to go into all the details).

Believing that something was up, McCarty started recording his productivity statistics. He testified that in early January he spoke to Winans and complained that his down time had been eliminated from his productivity figures. According to McCarty, Winans essentially ignored him.

On January 15, 2014, McCarty spoke to Englehart and repeated his claims about his down time not being recorded. Despite a statement by Englehart that McCarty shouldn't worry about it, McCarty received a 5-day suspension relating to his productivity.

During the period of his suspension and an overlapping vacation, McCarty had coworkers take photographs of his productivity numbers for the weeks ending January 11 and 18. These also showed that "down time" was deleted and therefore lowered McCarty's productivity percentage scores.

On February 18, 2014, soon after he returned from vacation, McCarty was presented with a write-up stating that his performance for the week of January 11, 2014 was at 94 percent of the standard and therefore that he was being terminated.

Subsequent to his discharge and during the investigation of the unfair labor practice charge, McCarty presented to the Regional Office evidence showing that the productivity figures that were used to justify his discharge were wrong. This was then transmitted to the Company on April 9, 2014. After making an internal investigation, the Respondent determined that a supervisor with access to the computer system had eliminated McCarty's "down time" in a way that lowered the productivity percentage numbers that were the basis of his suspension and discharge. And since the only persons who normally would access the applicable computer program are managerial or supervisory level people, it is probable, to a level of certainty, that

someone from management, (such as Winans or some other supervisor at his direction), had altered McCarty's productivity numbers in an effort to remove him from the Company. [4]

In this case, the evidence establishes that McCarty was the leading union activist among the employees after October 8; that the Respondent was fully aware of his union activity, and that the ostensible reason for his suspension and discharge was manifestly false. I therefore conclude that the General Counsel has established, by a preponderance of the evidence, that these actions by the Respondent violated Section 8(a)(1) and (3) of the Act. I also conclude that the Respondent has failed to show that it would have taken these actions apart from McCarty's union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) cert denied, 455 U.S. 989 (1982). See also, *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007) in which the Board concluded that where an employer's various asserted reasons were shown to be pretextual and false, it fails to meet its burden under *Wright Line*, even if one of its other asserted reasons may have been legitimate.

(e) Miscellaneous allegations

The General Counsel alleges that the Respondent unlawfully interrogated McCarty when he was asked by Clark "what's going on with this union stuff?"

While this single act of interrogation might be viewed as an offhand and somewhat innocuous comment, the fact is that this event occurred at or near the same time of the unlawfully motivated pay increase and the unlawful discrimination against Greichen. I therefore shall conclude that this interrogation, in the circumstances, violated Section 8(a)(1) of the Act.

The General Counsel alleges that the Respondent created the impression that the employees' union activities were being surveilled. In support of this allegation, McCarty, testified that on one occasion in October, 2013, he was called to a meeting and shown surveillance footage of him having a phone call in the common room. The General Counsel posits that since McCarty was known to be the active union supporter and since he had taken many phone calls in this area without prior objection, the only reasonable assumption is that the Company was engaging in surveillance of his union activity inside the facility. (I don't know if the surveillance system records are sound and therefore I don't know if it was possible for the Company to eavesdrop on any conversations that McCarty had with other employees in the plant).

The Company has maintained a surveillance system long before the advent of the Union. This was not altered when the Union and McCarty started their organizing efforts. The evidence shows that the Company's employees are aware of the surveillance system and this is referenced in the employee handbook.

In my opinion, the evidence as to this allegation is not sufficient to establish that the Respondent either engaged in surveillance of employee union activity or, by this one instance,

[4] With respect to the falsification of McCarty's records, the Company's investigation pointed toward a supervisor named Grace. But the testimony was that this person denied that he had falsified McCarty's numbers and except for a 5-day suspension with pay, he was not otherwise disciplined.

illegally gave the impression to employees that it was spying on their union activities. I shall therefore recommend dismissal of this allegation of the complaint.[5]

As stated in her Brief, the General Counsel alleges that since October 1, 2013, the Respondent has maintained an ongoing practice of requiring employees, "not to be involved in any conversations that are deemed rumor, hearsay or non-factual."

In support of this allegation, the General Counsel offered a group of documents relating to situations where employees were not fired after having been suspended termination. In these documents, there is a statement to the effect that the employee would not be terminated provided he or she agreed to certain stipulations, one of which was:

> If you agree to and sign this letter of agreement, you will be able to return to regular duties. Going forward, if it is shown after proper investigation that you violate any one or more or the following stipulations within the next six months… your employment status with the Company will be terminated.
>
> You must:
>
> * * *
>
> Not be involved in any conversations that are deemed hearsay, rumors or non-factual comments that cause any disruption in the business environment.

By inserting this statement in these documents, it is clear that the Respondent has created a rule that restrains at least those employees who have been given a second chance, from discussing, in an uninhibited way, the disciplinary actions taken against them with other employees. And since discussion by employees about the nature of, or extent of discipline, would relate to terms and conditions of employment, it can be construed as protected concerted activity within the meaning of Section 7 of the Act.

The General Counsel cites *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) along with *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) and *American Cast Iron Pipe Co*., 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979). For its part, the Respondent really did not address this issue in its Brief. As I think that the cases cited by the General Counsel are dispositive, I conclude that by maintaining this policy and requiring certain employees to acknowledge the policy as a condition of retaining their jobs, the Respondent has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[5] In her brief, the General Counsel noted that the complaint alleged that this event took place in early January 2014, instead of October 2013 and that the supervisor who allegedly committed the unfair labor practice was mistakenly identified as Dave Gardner. She therefore moved to amend the complaint to correct the matter. In light of my conclusion that the Respondent did not violate the Act in this manner, there is no need to rule on the Motion.

In addition to the standard remedy for 8(a)(1) & (3) cases, the General Counsel requests that the Respondent be required to read the notice to the employees at a meeting held on work time. In my opinion, this remedy is not required in this case.

From the Board's inception, it has as part of its usual remedial orders, required the offending party to post a notice describing employee rights under the Act and promising to abide by those rights. *Pennsylvania Greyhound Lines, Inc*., 1 NLRB 1 (1935).

Requiring an owner or high official of a company or a union to actually read aloud the notice to its assembled employees has not been typically required except in unusual circumstances. In *Federated Logistics & Operations*, 340 NLRB 255, 256–257 (2003), the Board described this as an "extraordinary remedy." This remedy, along with others, was imposed in a case where the employer (a) unlawfully interrogated employees; (b) created the impression of surveillance; (c) solicited grievances; (d) promised benefits; (e) threatened employees with the loss of existing benefits; (f) threatened to move its operations; (g) withheld benefits and (h) discriminatorily suspending employees for engaging in protected activity. Moreover, in that case, the results of an election were overturned and the Board ordered a new election. Given these findings, in the context of a pending election situation, a Board majority stated:

> The Board may order extraordinary remedies when the Respondent's unfair labor practices are "so numerous, pervasive, and outrageous" that such remedies are necessary "to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (and cited cases). For example, a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539–540 (5th Cir. 1969). In addition, the Board has ordered Respondents to supply up-dated names and addresses of employees to the Union because that "will enable the Union to contact all employees outside the [workplace] and to present its message in an atmosphere relatively free of restraint and coercion." *Excel Case Ready*, 334 NLRB 4, 5 (2001) (quoting *Blockbuster Pavilion,* 331 NLRB 1274, 1275 (2000)). Further, when a respondent "has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights," the Board has issued a broad order for the Respondent to refrain from misconduct "in any other manner," instead of a narrow order to refrain from misconduct "in any like or related manner." *Hickmott Foods*, 242 NLRB 1357 (1979).

Although the violations found in the present case are certainly not trivial, they are not, in my opinion, numerous, pervasive or outrageous. Nor has it been shown that the Respondent has violated the Act in the past or that it likely will violate the Act in the future. In these circumstances, it is my opinion that the Board should not require the owner of the Company to stand in front of his employees and publicly read the notice to the assembled group.

There is another very tricky question in this case; namely whether the Respondent should be required to offer reinstatement to Todd McCarty and whether his backpay should be terminated as of May 15, 2015.

On May 14, 2014, the Respondent transmitted to McCarty a written unconditional offer of reinstatement. This offered him full backpay and the retention of all of benefits including seniority. The offer did not ask McCarty to sign any settlement agreement or release and did not condition his acceptance of the offer on the withdrawal of any pending complaints. This offer gave McCarty 10 days to respond. This was later extended to May 28, 2014.

On May 19, McCarty sent an email to his lawyer and they put together a counter offer.[6] In the proposed counter offer, McCarty demanded, as a condition for accepting reinstatement, that the Company accept a number of demands, including the payment of additional leave money to which he was not entitled. Although this counter offer was sent, it went to the wrong email address and was not actually received. Nevertheless, this undelivered email does indicate that as of May 19, McCarty was reluctant to accept the reinstatement offer and was placing an obstacle to its acceptance. Since this email was not delivered, there was no company response.

McCarty testified that 2 days later, on May 21, he received a phone call in which the caller ID was blocked and where the caller said that if he did not drop his fucking lawsuit and "this union stuff," McCarty's family members who worked at BOZZUTO'S would be fired. He alleges that this caller also said that he had better watch his son when he drops him off at the skate park. McCarty could not identify the person who made the call and testified that he had a New York type of accent and spoke in a "tough" voice. McCarty did not identify this individual as being Jason Winans. Winans, by this time, had been transferred out of the warehouse.

McCarty testified that later in the evening, he received a second phone call from a blocked number where the caller allegedly said, "you got me mother fucker."

McCarty's billing records from Comcast show that eight calls were made to his phone on May 21 where the caller ID was blocked. Unless I am reading these records wrong, they show that four lasted for 0 seconds and apparently were hang-ups. One call was made at 10 a.m., lasting 5 minutes, 51 seconds; a second was made at 12:32 p.m., lasting 1 minute, 36 seconds; a third was made at 10:06 p.m., lasting 3 minutes, 3 seconds; and a fourth was made at 10:52 p.m., lasting 32 seconds.

On May 28, McCarty sent an email to the Company and rejected the reinstatement offer. He stated:

> Due to threats I have received against myself and my family and other factors, I Todd McCarty will not be accepting your offer of rehire. I believe these threats came from a representative of BOZZUTO'S management or BOZZUTO'S management alone. Myself and counsel deem your offer of rehire disingenuous and unrealistic with the parameters you set forth.

On May 30, 9 days after the calls, McCarty appeared at the local police station and filed a complaint about the threatening phone calls on May 21. The police report notes that McCarty came in at 4:27 p.m. and that:

[6] At this time, McCarty had retained a lawyer and had filed a lawsuit against the Company that made a number of allegations including the allegation that he had been wrongfully terminated. In June 2015, he amended that complaint to add Jason Winans as a defendant.

> Todd does not know the person that called and they blocked their number. He stated that there have been no further calls since then.
>
> At this time I have no suspect or further information. The caller did not make any direct threats and Todd just wanted this incident documented. Todd was advised to contact his service provider for his cellular phone to have them block all incoming private callers.
>
> No further police action.

McCarty claims he received another phone call on June 1, 2015, in which the caller said, "You're through." As to this call, McCarty testified that the number was not blocked and that it came from 860-758-7825. This is Jason Winans' home phone number. McCarty testified that he did not recognize the voice on the phone. He also took a photograph of the caller ID number.

On June 12, McCarty reported this phone call to the police officer and the police report states as follows:

> Todd McCarty contacted me and stated he received another unwanted phone call. He stated that he was called on 06/01/14 at approximately 2015 hours. Todd stated that the caller stated: "You're finished" then hung up. Todd stated that the phone number was not blocked this time and informed me that the name and number that his caller identification showed were Jason Winans, 860-758-7825.
>
> I then called Jason and spoke with him. He stated that he did not call Todd and would have no reason to. Jason was told to stop calling Todd and he stated that he understood.

McCarty's billing record shows a call received from Jason Winans at 860-758-7825 at 8:17 p.m. and lasting for seven seconds.

On the basis of the call on June 1 which is documented as coming from Winans, McCarty assumed, perhaps reasonably, that the previous blocked calls on May 21 also came from him. As such, it is argued that if McCarty was the recipient of these threats, then he legitimately could reject the Company's reinstatement offer without incurring the loss of any backpay or future reinstatement rights.

The problem is that Winans testified that he did not make any of these calls and he produced his billing records from Cox Communications which showed that no calls from 860-758-7825 were made to McCarty's phone on the dates in question.

This presents a quandary inasmuch as I have received into evidence the billing records of two well known cable companies that contradict each other.

At the resumption of the hearing, the Employer proffered an expert witness who was going to testify that it is possible for a person, using internet sites, to alter his own phone bill so as to show that phone calls were made to him when in fact no such calls were made. I rejected this testimony because the Respondent had not given the General Counsel notice of its intent to call an expert witness, despite the fact that there was a substantial hiatus between the opening of the case and its resumption. The General Counsel did not have any notice of what the expert

was going to say and did not have any report describing his findings. Therefore, the General Counsel could not, in my opinion, adequately cross examine this person or find an expert of her own. *National Extrusion & Mfg*., 357 NLRB No. 8 (2011).

Nevertheless, as an attachment to its Brief, the Respondent provided a copy of the Truth in Caller ID Act of 2009, 47.U.S.C. Section 227(e) and a copy of a related Federal Communications Commission Order dated June 22, 2011. As one is a statute and the other an official document, I will take official notice of both. The point being argued is that there is a practice called "Caller ID spoofing" whereby an individual can manipulate his caller ID. As stated in the FCC report; "Callers using some interconnected VOIP services can easily alter their caller ID by making a call appear to come from any number."

To my mind, this does not sufficiently answer the question of whether McCarty managed to alter his phone bill to show a call that was not actually made to him. Nor does it show if Winans managed to do the opposite; manipulate his billing records to eliminate a call that he actually made to McCarty. What might have helped would be some persons with expertise employed by the respective carriers who could testify as to what was possible and what was not.

On June 19, the Company became aware of two emails coming from addresses labeled winanslies@gmail.com and Jasonwlies@yahoo.com. These were two lengthy and essentially identical documents that set forth in great detail, the unnamed author's grievances and gripes involving Jason Winans from 2004 to the present. These documents, each totaling five single spaced pages, describe in great detail, a variety of incidents purporting to show the author's harassment by Winans, who is described as being conceited, condescending and narcissistic.

I am not concerned with the truth of the assertions made in these two emails. Rather, I am concerned by the timing of the emails, (soon after the alleged threats to McCarty), and the fact that McCarty denied being the author. In this respect, McCarty acknowledged that the contents of the emails were basically accurate insofar as his feelings about Winans and the various incidents described. His testimony was that they were "pretty dead on." And despite the fact that these narratives are so detailed, covered such an extended period of time, and included photos of McCarty and his photos of the June 1 caller ID number, it is hard for me to imagine that anyone other than McCarty could possibly have been the author. When I asked who he thought might have written these emails, McCarty responded; "I honestly don't know. I have suspicions." When asked to give his suspicions, McCarty said he couldn't speculate or throw anybody under the bus.

It is impossible, based on this record to say with certainty that anyone from management made the alleged threats described by McCarty as having occurred on May 21. Nor can I with certainty, determine if Winans called McCarty on June 1 and made the statement; "you're through."

Nevertheless it is my opinion that the evidence suggests that McCarty had already decided by May 28 to reject the Respondent's reinstatement offer, but then tried to set up a situation where he could blame the Company for his refusal. In this way, by rejecting the reinstatement offer, but asserting that his refusal was based on alleged threats, he could refuse to go back to work while preventing his backpay from being cut off.

Based on the above, I conclude that the Respondent made an unconditional offer of reinstatement. I also conclude that the evidence presented by McCarty is not sufficient to

warrant a conclusion that the Respondent, by its agents, engaged in subsequent threatening conduct that would vitiate the validity of the reinstatement offer. Accordingly, I conclude that backpay owed to McCarty should be tolled as of May 25, 2014, and that a reinstatement order is not required.

Having determined that the Respondent unlawfully suspended McCarty on January 15, 2014, and thereafter unlawfully discharged him on February 18, 2014, the Respondent must make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him until May 15, 2014.

Having concluded that the Respondent unlawfully discharged Patrick Greichen on October 8, 2013, it must offer him reinstatement and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

Backpay shall be computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

As to McCarty and Greichen, the Respondent shall be required to expunge from its files any and all references to the unlawful suspensions and discharges and to notify these employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate McCarty and Greichen for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [7]

ORDER

The Respondent, BOZZUTO'S Inc., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging, suspending or issuing warnings to employees because of their union or protected concerted activity.

(b) Interrogating employees about their support or activity for United Food and Commercial Workers Union, Local 919 or any other labor organization.

(c) Promising or granting wage increases in order to dissuade employees from supporting the Union.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Maintaining a policy of conditioning continued employment on an agreement by employees to refrain from talking about any disciplines that they have received or about their terms and conditions of employment.

(e) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Patrick Greichen and Todd McCarty whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this Decision.

(b) Within 14 days from the date of this Order, offer Patrick Greichen, full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Remove from its files any reference to the unlawful actions against Patrick Greichen and Todd McCarty and within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

(d) Reimburse Greichen and McCarty an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that would have been owed had there been no discrimination against them.

(e) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Greichen and McCarty it will be allocated to the appropriate periods.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post its Connecticut facilities, copies of the attached notices marked "Appendix."[8] Copies of the notices, on forms provided by the Regional Director for Region 1, after being signed by the Employer's authorized representative, shall be posted by the Employer and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Employer to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Employer has gone out of business or closed the facilities involved in these proceedings, the Employer shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since October 1, 2013.

Dated, Washington, D.C. June 25, 2015

_____
Raymond P. Green
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.
Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, suspend or discipline employees because of their union or protected concerted activities.

WE WILL NOT interrogate employees about their support or activity for United Food and Commercial Workers Union, Local 919 or any other labor organization.

WE WILL NOT promise or grant wage increases in order to dissuade employees from supporting the Union.

WE WILL NOT maintaining a policy of conditioning continued employment on an agreement by employees to refrain from talking about any disciplines they may have received or about their terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the rights guaranteed them by Section 7 of the Act.

WE WILL make Patrick Greichen and Todd McCarty whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL offer Patrick Greichen full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL remove from our files any reference to the unlawful actions against Patrick Greichen and Todd McCarty and within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

BOZZUTO'S Inc.
(Employer)

Date _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov. **A.A. Ribicoff Federal Building and Courthouse, 450 Main Street, Suite 410, Hartford, CT 06103-3022 860-240-3004**

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-115298 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 860-240-3524.